LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
MAY 2 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. 760

LOUIS BERRA,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

STANLEY M. ROSENBLUM,
MARK M. HENNELLY,
409 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes and Rule involved	3
Statement	3
Reasons for granting the writ	11
Conclusion	28
Appendix:	
Opinion	29
Statutes and Rule involved	43
Judgments	44-45

CITATIONS.

Cases:

Akers v. Scofield, 5 Cir., 167 F. 2d 718	19
Baker v. United States, 8 Cir., 115 F. 2d 533	26
Briggs v. United States, 4 Cir., 214 F. 2d 699, cert. den. 348 U. S. 864	16
Burdick v. United States, 236 U. S. 79	26
Commissioner v. Wilcox, 307 U. S. 404	9, 15, 17, 20, 24
Dillon v. United States, 8 Cir., 218 F. 2d 97	11, 15
Gustafson v. Taber, 125 Mont. 225, 234 P. 2d 471	22
Kann v. C. I. R., 3 Cir., 210 F. 2d 247, cert. den. 347 U. S. 967	16
Marienfeld v. United States, 8 Cir., 214 F. 2d 632, cert. den. 348 U. S. 865	9, 16
Mason v. United States, 244 U. S. 362	27
Michelson v. United States, 335 U. S. 469	12

People v. Gorman, 94 Cal. App. 397, 271 P. 361....19, 22
Reeves v. State, 95 Ala. 31, 11 So. 158.....19, 22
Richberger v. State, 90 Miss. 806, 44 So. 772..... 19
Roilinger v. United States, 8 Cir., 208 F. 2d 109.... 16
Rutkin v. United States, 343 U. S. 130.....9, 15, 24
State v. Johnson, 109 Kan. 234, 199 P. 104.....19, 22
State v. Larson, 123 Wash. 21, 211 P. 885.....19, 22
Ulledalen v. U. S. Fire Ins. Co., 74 N. D. 589, 23 N. W. 2d 856 22
Union Marine General Ins. Co. v. Holmes, 249 Ala. 294, 31 So. 2d 303 22
United States v. Bruswitz, 2 Cir., 219 F. 2d 59..... 16
United States v. Hoffman, 341 U. S. 479..... 27
United States v. James, 2 Cir., 208 F. 2d 124...10, 11, 12
United States v. Royer, 122 Fed. 844.....19, 22
Viereck v. United States, App. D. C., 139 F. 2d 847.. 26

Constitution:

Constitution of the United States, Fifth Amendment 25, 26, 27

Statutes:

Section 145 (b), 1939 Internal Revenue Code.....2, 4, 14
Section 3616 (a), 1939 Internal Revenue Code..2, 9, 11, 15

Rule:

Rule 31 (c), Federal Rules of Criminal Procedure..14-15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the respective judgments in the above-consolidated causes of the United States Court of Appeals for the Eighth Circuit, entered in these cases on April 22, 1955.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 29-42.

JURISDICTION.

The judgments of the Court of Appeals were entered on April 22, 1955 (Appendix, infra, pp. 44-45). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

(1) Whether in a federal criminal prosecution the government on its case-in-chief can introduce evidence of defendant's bad character by reference to a prior arrest of defendant unconnected with the instant charges and colorless as to identity, intent or previously conceived design.

(2) Whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(3) Whether an employee (given the right to draw checks on his employer's bank account and control thereof) who draws checks thereon to satisfy personal obligations and who knowingly pays out his employer's money to an accomplice on overstated bills for labor, receiving back from the accomplice the amounts of

overstatements, is guilty of embezzlement and, therefore, not obligated to report such misappropriated funds as taxable income.

(4) Whether a defendant in a federal criminal prosecution who takes the stand in his own behalf may be impeached with his prior refusals to answer on the grounds of self-incrimination when he was called before the grand jury which indicted him and refused to answer for fear that he was a prospective defendant, and whether a defendant so impeached is entitled to a cautionary instruction telling the jury that his refusals to answer are not evidence of his guilt and are not to be considered in that regard.

(5) Whether upon a conviction of an employee of a labor-sponsored organization for endeavoring to obstruct the administration of justice, a condition of defendant's probation which prevents his employment by any labor or labor-affiliated organization is reasonable and represents an abuse of discretion.

STATUTES AND RULES INVOLVED.

The pertinent statutes and rules are printed in the Appendix, infra, p. 43.

STATEMENT.

The petitioner was convicted on both counts of a two-count indictment charging him with corruptly endeavouring to influence a witness before a grand jury and obstruct, influence and impede the due administration of justice, in violation of Title 18, U. S. C. A., Section 1503. He was also convicted on all counts of a three-count indictment charging income tax evasion for the years 1951,

1952, and 1953 in violation of Title 26, U. S. C. A., Section 145 (b). Both cases were consolidated for trial before a jury. Petitioner was sentenced to four years imprisonment on each of the three counts in the tax evasion case, the sentences on all counts to run concurrently. In the other case, the trial court suspended imposition of sentence and placed petitioner on probation for five years, said probation to begin and run consecutively with the term of imprisonment imposed in the tax evasion case, and with the special condition that petitioner shall not, during the period of probation, act as an officer, representative, or employee of any labor union or its affiliates (R. 233-239).

Petitioner during the years 1951, 1952, and 1953 was the business manager of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical care to members of Teamsters' Local 688, A. F. of L., and their families (R. 51-54). The Labor Health Institute is operated on funds collected from employers who maintain collective bargaining agreements with Local 688 (R. 51). As business manager of the Labor Health Institute, petitioner controlled the organization's bank account (R. 120); he personally approved payment of all bills incurred by the Labor Health Institute and drew and signed the checks therefor (R. 55, 120, 128, 153). The checks were countersigned by another employee (R. 55, 120, 128). In 1949 the Labor Health Institute contracted with J. Shulman and Sons Contracting Company for extensive alteration work on its premises in St. Louis (R. 133). The general contractor subcontracted the painting work to one John Schmidt (R. 67, 79). In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work (R. 67). Schmidt testified that petitioner then approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor

performed; petitioner, knowing of Schmidt's overstatements, would approve the bills, sign and draw checks in his capacity as business manager on the organization's bank account to Schmidt, issue payment to Schmidt, and then Schmidt would return the amount of the overpayment to petitioner (R. 67). It was Schmidt's testimony, and some of his checks were introduced in substantiation, that petitioner had received some $5,000.00 under this arrangement during the years 1951, 1952, and 1953 (R. 71, 72). He testified that he deducted these payments as commissions on his own income tax returns (R. 70, 71). During these same three years Schmidt testified that he did approximately $2,500.00 to $3,000.00 worth of painting at petitioner's home which, with petitioner's knowledge and connivance, he charged in his billing to the Labor Health Institute and received payment in the same way; that is, petitioner approved his bill, knowing it was overstated, drew and signed the organization's check, and issued payment to Schmidt (R. 72, 73). The evidence also showed that in 1951 petitioner had the J. Shulman and Sons Contracting Company subcontract for certain concrete work at his home and build a knotty pine rathskellar in his basement (R. 57, 59-62, 136). The cost of this work (some $1,500.00) was recovered by the J. Shulman and Sons Contracting Company by billing it to the Labor Health Institute, securing petitioner's approval of the bills, and petitioner's issuing checks in payment, signed by him in his capacity as business manager and drawn on his employer's checking account (R. 135). These amounts constituted the alleged unreported income received by petitioner during the three years in question.

Petitioner took the stand in his own behalf and admitted receiving the money Schmidt claimed to have paid him (R. 144-146). He insisted, however, that these payments were loans and that he had later partially repaid Schmidt (R. 144-146). He denied the arrangement outlined by

Schmidt whereby petitioner would pay Schmidt's padded bills with Labor Health Institute funds (R. 145); he denied that he had used his employer's funds to pay for Schmidt's painting done at his home (R. 145). He denied any knowledge that the J. Shulman and Sons Contracting Company had billed the Labor Health Institute for the work at his home or that he had used the organization's funds to pay for the work (R. 149-150). He said that he learned of this misconduct by the Shulmans only after the grand jury investigation (R. 150). In connection with the charges against him for endeavouring to obstruct justice, he denied that he at any time had urged Schmidt to destroy any of his records or to lie before the grand jury (R. 146-149).

During the direct examination of the witness Schmidt who was the government's principal witness, a prior arrest of the petitioner was referred to within the hearing of the jury on three different occasions by the witness Schmidt, the trial judge, and the prosecutor, as follows (R. 73, 74):

> "Q. Now, Mr. Schmidt, you have testified that the defendant Berra asked you to destroy certain records. Did he ever, or can you fix in your mind the time when these efforts increased, if they ever did?
>
> A. Well, he was constantly after me to ask me why I kept that daily work sheet, and I told him I kept that for my records. He constantly told me to get rid of them, or, oh, I remember very closely after Mr. Berra was arrested, why he called me up, and that was on George Washington's Birthday, the 22nd of February.
>
> Q. Now, will you tell the jury what the conversation was with Mr. Berra on George Washington's Birthday?
>
> A. He called me up and asked me——

The Court: Just a moment. Before you go further, we will take the morning recess, right here. Announce a ten minute recess.

(11:17 a. m. Recess ten minutes.)

The Court: This witness was asked to describe a conversation on the 22nd day of February, is that correct?

A. That is right.

The Court: What year?

A. This year.

Q. I believe you testified that on Washington's Birthday, February 22, this year, 1954, the Defendant Lou Berra called you up; is that correct?

A. That is right. That is right.

The Court: Just a moment. I understood you to say it was after the defendant had been arrested. Did you say that?

A. No. No. I did say it, but that is not correct.

(Mr Stanard and Mr. Hennelly confer with the Court, off the record and out of the hearing of the jury.)

The Court: You better clear that up before you get through your case, because that doesn't correspond with the indictment. It is very material.

(Further discussion.)

The Court: Proceed.

Q. Mr. Schmidt, you have mentioned, I believe, before the recess, something about the defendant's arrest, that has nothing to do with this case, or with this indictment at all?

A. None whatsoever.

Mr. Hennelly: I am going to object to that, ask it be stricken and that the jury be instructed to disregard it, and that a mistrial be declared.

The Court: Overrled. Go ahead. Proceed. Proceed with your examination of the witness."

Petitioner's objection to the mention of his prior arrest, his request that the jury be instructed to disregard it and a mistrial be declared were overruled by the trial court without comment (R. 74).

On cross-examination of petitioner, the government was permitted to impeach him with his prior refusal to answer some twenty-seven questions before the grand jury which indicted him. The series of questions involved went to the heart of the charges on which petitioner was later indicted, tried and found guilty. The questions inquired of petitioner whether he had received monies from John Schmidt; whether these monies were loans and whether he had requested John Schmidt to destroy his records of dealings with petitioner (R. 164-175). To each question petitioner had answered to Mr. Goldsehein, the special prosecutor, that he felt he was not before the grand jury as an ordinary witness, but as a prospective defendant (R. 164-175); he also stated that he was informed that he was under investigation for income tax evasion and therefore, he refused to answer because his answers might tend to incriminate him (R. 172).

Petitioner's motions for judgments of acquittal were filed in both cases at the close of the government's case and at the close of the entire case (R. 125-127, 183-186); all motions for judgment of acquittal were overruled (R. 125-127, 183-186). The basis for petitioner's motions for judgment of acquittal in the tax evasion case was that the allegedly unreported funds were under the government's own evidence embezzled funds and, therefore, not properly reportable by petitioner (R. 125-127, 183-186). Petitioner's Requested Instructions No. 3 and No. 4, spelling out this same theory of defense, were refused by the trial

court and duly excepted to by petitioner (R. 213, 214). The trial court also refused to give petitioner's Requested Instruction No. 13 which would have told the jury that the fact that petitioner had invoked his constitutional privilege against self-incrimination constituted no evidence whatsoever of petitioner's guilt and was not to be considered by them in that regard (R. 217). Petitioner excepted to such refusal by the trial court on the ground that it violated and nullified his constitutional privilege against self-incrimination (R. 217). Furthermore, the trial court refused to give petitioner's Requested Instruction No. 12 that the jury might find him guilty of a lesser offense—specifically a misdemeanor under Section 3616 (a) of the Internal Revenue Code (R. 214-217). This refusal was excepted to on the ground that such instruction was mandatory under Rule 31 of the Federal Rules of Criminal Procedure (R. 214, 215).

On April 22, 1955, the United States Court of Appeals for the Eighth Circuit issued its order affirming the judgments and sentences on all counts of the tax evasion case and on the second count of the obstruction of justice case; it vacated the judgment and sentence on the first count of the obstruction of justice case (Appendix, infra, pp. 44-45), for reasons not germane to this Court's review.

The court below affirmed the conviction on the ground that the case of **Commissioner v. Wilcox**, 327 U. S. 404, as limited to its facts in **Rutkin v. United States**, 343 U. S. 130, did not apply because the monies received by petitioner came from Schmidt, not from his employer the Labor Health Institute. The funds in this case, the court said, went first to Schmidt; therefore, this could not be the crime of embezzlement because none of the funds came into petitioner's possession lawfully or in the course of his employment. The court relied on its earlier case of **Marienfeld v. United States**, 214 F. 2d 632, cert. den. 348

U. S. 865, to the effect that petitioner had sufficient economic control as readily to realize economic value from it. In connection with the petitioner's contention that the government had put his character in issue on its case-in-chief when the government witness Schmidt referred to a prior arrest of petitioner not connected with the instant charges, the court distinguished the almost identical case of **United States v. James**, 2 Cir., 208 F. 2d 124, where it was held prejudicial error for a narcotics agent to have referred in the prosecution's case to a prior arrest of a defendant not connected with the instant trial. The distinction was rested on the ground that in the **James** case the testimony came from the lips of a government narcotics officer who, it may be assumed, was more familiar with courtroom rules of evidence than was the witness Schmidt in the instant case. However, the court below considered it advisable to admit this distinction to be a "thin one" and to state that to the extent the holding in the **James** case may be inconsistent with its decision in the instant case, it was refusing to apply the Second Circuit case (Appendix, infra, p. 37):

> ". . . Admittedly, this distinction is a thin one, and to the extent that the **James** case may be inconsistent with our decision herein, we do not apply it."

The court held, in regard to petitioner's impeachment with his prior refusals to answer before the grand jury, that the trial court was justified in permitting such impeachment and in refusing to give petitioner's requested cautionary instruction in connection therewith. The court could discern nothing unjust or unfair in a rule permitting such impeachment of a defendant who elects to take the stand in his own behalf because he thereby waives his privilege of immunity and becomes subject to cross-examination and impeachment the same as any other witness. It concluded with respect to petitioner's contention that the terms of his probation were unreasonable in that

they even denied him the right to be employed by a labor organization in any capacity that the terms of probation are discretionary with the sentencing court. It concluded that it was not an abuse of discretion for the trial court to be of the opinion that the petitioner's rehabilitation would proceed more effectively if he were entirely dissociated from all union or union-connected activity during the period of probation. Finally, the court decided the trial court's refusal to give a lesser offense instruction under 3616 (a), 26 U. S. C. A., was correct under its earlier opinion in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, in which case this Court granted a writ of certiorari on April 25, 1955, because of the importance of the question presented; see **Dillon v. United States**, No. 629, this Term.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case and that of the Second Circuit in **United States v. James**, 2 Cir. 208 F. 2d 124 (wherein the question of the admission of a defendant's prior arrest on the government's case-in-chief was considered) are in conflict; this conflict was conceded in the court below (Appendix, infra, p. 37).

In the **James** case the United States Court of Appeals for the Second Circuit ruled on a situation almost identical to the instant case and ordered a conviction reversed. In that case the admission of such evidence was permitted by the trial court when a government narcotics officer referred to a prior arrest of the defendant unconnected with the instant charge; the Second Circuit reversed because of a dominant policy which recognizes that which tends to show a likelihood that the accused had flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial. Because the evidence of the prior arrest, as in the instant case, did

not come within any applicable exception to the general rule of exclusion (it was colorless as to identity, intent, or previously conceived design), the Second Circuit concluded that the effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and blacken the character of the defendant who, like petitioner here, at no time put his character in issue. In the instant case, no exception to the general rule of exclusion is similarly applicable to permit the admission into evidence of the witness Schmidt's reference to petitioner's prior arrest. The reference is equally as colorless as that in the **James** case. The court below, however, suggests a distinction between the cases, which it admits to be a "thin one" (Appendix, infra, p. 37), in that the narcotics agent in the **James** case may be assumed to have been more familiar with the courtroom rules of evidence than the witness Schmidt in the instant case. Recognizing the thinness of its distinction, the court below concludes (Appendix, infra, p. 37):

> ". . . Admittedly, this distinction is a thin one, and to the extent that the holding in the **James** case may be inconsistent with our decision herein, we do not apply it."

Furthermore, the decision of the court below, it is submitted, is erroneous and the decision of the United States Court of Appeals for the Second Circuit in **United States v. James**, supra, is correct. Morever, the decision of the court below conflicts with the decision of this Court in **Michelson v. United States**, 335 U. S. 469, wherein this court treated the problem, l. c. 475, 476:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presump-

tion of good character, Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, 38 S. Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

It is clear from the **Michelson** case, and as properly interpreted by the Second Circuit in the **James** case, that the policy of excluding such evidence is to prevent its being given undue weight by the jury to the prejudice of a defendant. Accepting this premise, petitioner contends that the jury's prejudice is neither mitigated nor lessened because it hears the prejudicial testimony from the lips of a painter, Schmidt, rather than from the lips of a government agent. The distinction suggested by the court below that the error is cognizable or not depending on the assumed familiarity of the witness with courtroom rules of evidence flies in the face of this Court's "overriding policy" expressed in the **Michelson** case; it completely begs the question of the prejudicial effect of the testimony on the twelve persons sitting in the jury box and reduces the question of prejudicial error to assumptions concerning a witness' earlier exposure to the rules of evidence. Is a jury less "overpersuaded" by the proof of a defendant's bad

character when it comes from a painter rather than a government agent? Where in the scale of occupations ranging from painter to narcotics agent does the assumed familiarity with the courtroom rules of evidence become sufficient that such testimony is prejudicial to a defendant? It is suggested that the "thin" distinction offered by the court below completely overlooks that the policy of the rule is to assure the defendant a fair trial; it is not to penalize the witness or prosecutor for unfair play—so that an evaluation of the witness as to motive or knowledge of the inadmissibility of his testimony shifts the emphasis from the basic inquiry.

The opposing opinion of the Second Circuit in the **James** case places no such qualitative restriction on the source of the inadmissible testimony referring to a defendant's previous bad character, nor is any implied or warranted by this Court's opinion in the **Michelson** case. In the last analysis the inconsistency admitted to exist by the court below between its opinion and the **James** opinion of the Second Circuit is one to be settled by this Court. The question of the admissibility of character evidence by the prosecution before the defendant has put his character in issue is important in the administration of justice; whether through malice, inadvertence, or prompting, the problem is likely to present itself every day in our federal criminal trials. This Court should consider such an important problem; if the door to the admissibility of such evidence by the prosecution is to be opened in some circuits and not in others, then confidence in the uniformity of the administration of criminal justice is lost. The resolution of this conflict, therefore, is plainly in the public interest.

2. The question is of importance and in the public interest whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of

the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether the defendant committed the greater or lesser offense. The reasons for granting the writ on this issue have been well stated in the petition for certiorari filed in **Dillon v. United States**, No. 629, this Term, wherein this identical question was presented to this Court. On April 25, 1955, this Court granted petitioner Dillon's writ of certiorari and will review the question, similarly preserved in the instant case (Appendix, infra, p. 42). It is submitted that this Court has already accorded cognizance to the importance of this question, now twice decided by the United States Court of Appeals for the Eighth Circuit, and that petitioner's writ should be granted that he may present his arguments in support of the proposition and come within this Court's ruling of the issue.

3. The opinion of the court below is erroneous and conflicts with this Court's decision in **Commissioner v. Wilcox**, 307 U. S. 404, holding embezzled funds not to be taxable income. This question is an important one because it affects not only the proper administration of the revenue laws but also the administration of criminal justice, both on the federal and state levels. The basic problem goes back to the 5-4 decision of this Court in the case of **Rutkin v. United States**, 343 U. S. 130, holding extorted funds to be taxable income. The effect of the **Rutkin** case on the **Wilcox** doctrine has been subject to much debate and controversy by the various Courts of Appeal and various writers in legal periodicals.

To this apparent conflict between **Wilcox** and **Rutkin**, there has been added a policy of studied indifference to the **Wilcox** rule by the Courts of Appeal with whom the **Wilcox** doctrine has not been popular; the language of

the **Rutkin** case limiting **Wilcox** to its facts has furnished sufficient grounds for distinguishing that case and refusing to apply it to any given fact situation so that in no circuit since the **Rutkin** opinion has the **Wilcox** rule ever been held applicable. In **Kann v. C. I. R.**, 3 Cir., 210 F. 2d 247, cert. den., 347 U. S. 967, the asserted bases for distinction of the **Wilcox** case offered by the majority opinion were such that Judge Kalodner, writing for the dissent, characterized them as "distinctions without a difference". Of the Tax Court in the same case, he said, that it disclosed an amazing dexterity in judicial legerdemain in distinguishing **Wilcox.** In **United States v. Bruswitz**, 2 Cir., 219 F. 2d 59, in rejecting a taxpayer's argument that commercial bribes closely resembled embezzled funds, the Second Circuit found it difficult to perceive what, if anything, is left of the **Wilcox** holding after **Rutkin.** In the Eighth Circuit the problem was first presented to the Court of Appeals in **Rollinger v. United States**, 8 Cir., 208 F. 2d 109, where **Wilcox** was found not to apply because the property had not been fraudulently appropriated by the person (i. e. taxpayer) to whom it had been entrusted in the first instance. The court thought that because the wrongdoer had wrongfully acquired the property in the first instance by means of a false pretense that the taxpayer was guilty of obtaining property by false pretenses. The **Rollinger** case was the authority for the Fourth Circuit's later distinction of the **Wilcox** case in **Briggs v. United States**, 4 Cir., 214 F. 2d 699, cert. den., 348 U. S. 864. Subsequently, in **Marienfeld v. United States**, 8 Cir., 214 F. 2d 632, cert. den., 348 U. S. 865, a taxpayer convicted of evasion pleaded the defense of embezzlement. After some misgivings the majority reconciled the **Wilcox** and the **Rutkin** cases on the basis of the wrongdoer's deferred obligation to account for the funds received. The Eighth Circuit did not deny that the misappropriation by Marienfeld was embezzlement, but found the **Wilcox** case distinguishable. Its reasoning was

that Wilcox had been at all times under an immediate and instantaneous legal obligation to pay over the money collected for his employer, while Marienfeld's obligation to pay over the money which he misappropriated did not arise until a report of the proceeds was made and a statement rendered to the company for which he acted. In effect, the majority further refined the **Wilcox** doctrine by subdividing embezzlement into types so that only in that type where there existed a kind of pre-embezzlement obligation to account on the part of the embezzler would **Wilcox** apply and in those types, as **Marienfeld**, where the obligation to account arose post-embezzlement, **Wilcox** would not apply. It was on the basis of such reasoning that the **Wilcox** case was successfully distinguished; however, one judge, with candor, wrote a special concurring opinion in which he rejected such reasoning, but went on to make clear that he would not apply **Wilcox** under any circumstances. It was his thesis that the ill-gotten proceeds of embezzlers, robbers, burglars, larcenists, and of all criminals, were taxable income. See Judge Johnsen's concurrence, 214 F. 2d 639-640. The inescapable conclusion left by these cases is that the Courts of Appeal believe little in the efficacy of the **Wilcox** case; yet this is a problem on which certiorari was first granted to settle a conflict between the circuits on a question of importance. It would appear that the conflict is now between the Courts of Appeal and this Court. If **Commissioner v. Wilcox**, supra, has "earned its just repose", it should be for this court to lay it to rest. If the proceeds of all common-law crimes against property shall be considered henceforth as taxable income, as suggested by Judge Johnsen, then counsel representing persons accused of such crimes in the various state courts should be sufficiently advised of the risk of federal tax prosecution that they may intelligently counsel such persons who may be entertaining the thought of a guilty plea. In any event, the heaping of refinement upon refinement and dis-

tinction upon distinction by courts struggling to escape the impact of the **Wilcox** case, as in the instant case, does no credit to our search for some basis of precedent and certainty which is characteristic of a common-law jurisprudence.

The error born of a court's aversion to the **Wilcox** doctrine is nowhere better demonstrated than in the instant case. Here the government's proof—uncontradicted and bolstered by petitioner's—was that petitioner was at all times in control of his employer's bank account and the monies which he allegedly misappropriated in his capacity as business manager. With respect to the $2,500-$3,000 painting done by Schmidt at petitioner's home and paid for out of Labor Health Institute funds, it is clear that petitioner used his employer's money to satisfy a purely personal obligation. The same is true of the $1,500 worth of concrete and carpentry work done at petitioner's home by J. Shulman and Sons Contracting Co. In both cases, he paid the money to the contractor and received none of it back. The remainder of the allegedly unreported income he received by paying out his employer's money to Schmidt for painting work which petitioner knew had not been done and then receiving back this overpayment from Schmidt. The answer of the court below is that these instances of misconduct do not constitute embezzlement because the petitioner received the money from Schmidt, not from his employer Labor Health Institute. The court adopts the trial court's reasoning that the funds had never been received by petitioner in the course of his employment and thereafter converted to his own use. The court breaks down petitioner's misconduct into steps: first, the funds went to Schmidt, who obtained them by fraud and deceit; secondly, Schmidt gave them to petitioner so that when petitioner obtained possession from Schmidt, he did not do so as a matter of trust from his employer or in the course of his employment. It is submitted that the court's

reasoning overlooks the initial possession of the funds misappropriated by petitioner when his employer entrusted him with the possession and control of its deposited funds by permitting him to draw and sign checks on its account. **This is the possession entrusted to petitioner by virtue of his employment as surely as the actual physical possession of the bookkeeper in the Wilcox case.** The requisite control or possession for embezzlement of an employee entrusted with his employer's funds has never been restricted to manual and physical control or possession, the right to draw on them (or constructive control and possession) being sufficient. **State v. Johnson,** 109 Kan. 234, 199 P. 104; **State v. Larson,** 123 Wash. 21, 211 P. 885; **Reeves v. State,** 95 Ala. 31, 11 So. 158; **People v. Gorman,** 94 Cal. App. 397, 271 P. 361; **United States v. Royer,** 122 Fed. 844; **Richberger v. State,** 90 Miss. 806, 44 So. 772.

Because of the fact that the pertinent claims for labor rendered to the Labor Health Institute by Schmidt and Shulman were false, petitioner submits that the court below erroneously concluded the situation to be one of obtaining money under false pretenses. This overlooks the basic realism that embezzlers generally seek to cover their tracks by making false representations to their employers. Because the false representation is made as here by an accomplice on the employee's behalf does not dictate a different result. As noted by the Eighth Circuit Court of Appeals in the **Rollinger** case, supra, the major distinction between the crimes of embezzlement and false pretenses is not found in the presence or absence of a false representation to the victim, but in the initial entrusting of possession or control to the wrongdoer in the one as contrasted with its total absence in the other. Furthermore, in false pretenses the victim intends to pass title to the wrongdoer, while in embezzlement there is no such intent. **Akers v. Scofield,** 5 Cir., 167 F. 2d 718. The following

hypothetical situations (in each of which the wrongdoer had no claim of right), it is submitted, illustrate such basic principles and demonstrate where the court below erred in failing to apply them to the instant embezzlement:

(1) B is an employee of L Corporation. There is physically turned over to him in the normal course of his duties $2,000.00 in cash to pay legitimate bills presented by the corporation's supplier's. B takes $500.00 of this amount and deposits it in his bank account and uses the money to pay for repairs on his home. What crime has been committed? B is guilty of embezzlement; he was entrusted with the possession of his employer's funds and converted them to his own use. There was no intent to pass title to the $500.00 by L Corporation or any such intent which could be ascribed to L Corporation. The obligation of B to repay the $500.00 was immediate and unqualified upon his unauthorized taking and the $500.00 is not income to B, **Commissioner v. Wilcox**, supra.

(2) Same facts as in 1, except that B, instead of just taking the money, seeks to cover his tracks by submitting to his employer, L Corporation, a fake bill allegedly rendered to him by the S supplier and allegedly paid in cash by B. S has no knowledge of the transaction. What crime? Same result; the crime is embezzlement. Despite the false representation by B to his employer L Corporation (i. e., that he paid a bona fide bill on his employer's behalf to S) he has converted money lawfully and originally entrusted to his (B's) possession. L Co. had no intent to pass any title. The obligation of B to repay the $500.00 was immediate and unqualified upon his unauthorized taking—no income to B.

(3) Same facts as in 2, except that S is a confederate of B's and at B's insistence renders on one of his invoices a billing for services never, in fact, rendered to L Co. B pays the bill to S with $500.00 of the money entrusted

to him by his employer L Co., well knowing that it is false. S, on receipt of the money, hands over same to B who uses it to pay for repairs on his home. What crime? The crime is still embezzlement; the fact of the false representation does not change the nature of the crime. B still had the initial lawful requisite possession of the funds which were converted to his own use. No title to the $500.00 passed from L Co. to S or to B because L Co. had no intent to pass title. Whatever may have been B's intent in this matter is immaterial and cannot be ascribed to L Co. under settled principles of respondeat superior because B was acting inimical to the interest of his employer, contrary to express directions, and outside the scope of his authority. The obligation of B to repay the $500.00 was immediate and unqualified upon his illegal taking; in this case B's unlawful taking is represented by the unauthorized payment to S who serves as a convenient depository for the moneys misappropriated from L Co.— no income to B.

(4) Same facts as in 3, except that, instead of being physically furnished with $2,000.00 in cash, B is given a key to L Co.'s strong box containing $2,000.00 in cash for the payment of L Co.'s legitimate bills. B goes to the strong box, opens it with the key, and pays S's false bill in the manner set forth in Example 3 above. What crime has B committed? The crime is still embezzlement; B had the constructive possession (i. e., control and access to) of his employer's funds so entrusted to him. He need not have them in his physical and manual possession. For the reasons stated in Example 3 above, the L Co. could have had no intent to pass title and B's obligation to repay the $500.00 was immediate and unqualified—no income to B.

(5) Same facts as in 4, except that, instead of being given access to L Co.'s strong box, containing cash in

the amount of $2,000.00 by having been furnished with a key, B is given the authority to sign checks and draw on L Co.'s account at the Y Bank for the payment of L Co.'s legitimate bills. Of what crime is B now guilty? The crime is embezzlement; B, by his control and access to his employer's bank account, had constructive and lawful possession of his employer's monies; he converted $500.00 of that amount to his own use. L Co. had no intent to pass title to S. B was under an immediate and unqualified obligation to return the money so converted. Embezzlement convictions have been uniformly upheld where the employee had control and access to his employer's funds on deposit with a bank and not in the employee's actual physical possession, **State v. Larson,** supra; **State v. Johnson,** supra; **Reeves v. State,** supra; **People v. Gorman,** supra; **United States v. Royer,** supra. No income to B.

(6) Same facts as in 5, except that, although B is given the authority to sign checks and draw on L Co.'s bank account in the Y Bank, employee C countersigns the checks. What crime? Same result—embezzlement. A countersignature merely attests the authenticity of B's signature. **Union Marine and General Ins. Co. v. Holmes,** 249 Ala. 294, 31 So. 2d 303; **Ulledaleh v. U. S. Fire Ins. Co.,** 74 N. D. 589, 23 N. W. 2d 856; **Gustafson v. Taber,** 125 Mont. 225, 234 P. 2d 471. B still has constructive and lawful possession of his employer's bank account. He misappropriated the money from the possession so entrusted when he drew an unauthorized check to S. When the accomplice S physically hands over the misappropriated funds to B, this does not change the nature of the crime from embezzlement. It would be just as fallacious to say that B did not have possession entrusted to him because the last physical step was the transfer of the money from S to B as it would be to say that there was no possession for embezzlement in the bookkeeper Wilcox because he

received the money physically from persons other than his employer. This is where the court below erred. L Co. had not the requisite intent to pass title for false pretenses because B's intent could not be ascribed to it; B was acting inimical to the interests of his employer and had departed from the scope of his authority. This Example 6 is the phase of the instant case represented by the payments from Schmidt to petitioner and represents no income to petitioner.

(7) Same facts as in 6, except that S is not an accomplice of L. The false claim is presented to B by S and paid by B without knowledge of its falsity. What crime? Like all the prior examples, the funds are lawfully and initially entrusted to B's constructive possession. What considerations would lead to a different result? First, absent B's connivance, the property is acquired in the first instance by S, the wrongdoer, as the result of a false pretense; this is unlike the prior examples where B, the wrongdoer, had initial possession and then unlawfully converted a part of the funds lawfully in his possession. The consideration to be resolved in distinguishing between embezzlement and false pretenses is when the wrongdoer first acquired possession. If he had possession, then transmitted same to a third party who returned the money to him, the crime is still embezzlement. (It is submitted that it would be overlooking realities, as the court below did in the instant case, to say that Berra acquired possession from Schmidt, when Berra had constructive possession from the Labor Health Institute's first receipt of the money and deposit to its account. Thus, in the instant Example No. 7, it is seen that there is no fraudulent appropriation by the person B to whom it had been entrusted, but a wrongful acquisition by the wrongdoer S in the first instance as a result of a false pretense.) Also, it is submitted that Example 7 presents a clear case of obtaining

property by false pretenses because there is present the requisite intent by L Co. to pass title to S. Because B is unaware of the fraud practiced upon his employer, he is not acting outside his authority and his intent to pass title is properly ascribable to L Co. In this case S is under no immediate obligation to repay; he has acquired a voidable title and enjoys the use of the money until L Co. seeks to void the transaction, thereby enjoying income under the rule of the **Rutkin** case, supra.

(8) B is an employee of L Co.; he signs checks and has control of L Co.'s bank account for the purpose of paying the legitimate bills of L Co. to various contractors who are remodeling L Co.'s place of business. B prevails upon contractor S to do $2,500.00 worth of painting at his (B's) home and upon contractor S-1 to complete $1,500.00 worth of concrete and carpentry work; he advises S and S-1 to bill L Co. for this work. B approves said bills, draws checks on L Co. in payment, and secures the proper countersignature, and pays S and S-1 for the work done. What crime? This is the Shulman phase of the instant case (i. e., the $1,500.00) and the $2,500.00 painting work allegedly done by Schmidt for Berra. For the foregoing reasons (B's control and access to L Co.'s bank account and L Co.'s lack of intent to pass title), it is submitted that Example 8 presents a clear case of embezzlement and no income to B.

Under the foregoing situations, the common law principles of crimes amply demonstrate the correctness of petitioner's contention that the monies allegedly unreported as income were embezzled funds. A necessary corallary to such a conclusion is that petitioner acquired void title to said funds under the Government's own evidence and was at all times under an immediate and unqualified obligation to return same to the Labor Health Institute; such illegally acquired property is not income under this Court's holding in the **Wilcox** case, supra.

4. This case raises important questions concerning the Fifth Amendment and particularly the privilege against self-incrimination. Whether a prospective defendant can be brought before a grand jury with knowledge that he is being investigated for tax evasion and be subsequently impeached by his refusal to answer incriminating questions before that body is a question with far-reaching implications in the administration of criminal justice. Whether, assuming such impeachment is proper, a trial court upon request must give a cautionary instruction (telling the jury that defendant's invocation of his privilege against self-incrimination constituted no evidence whatsoever of his guilt and was not to be considered by them in that regard) is equally far-reaching.

The question involves the spirit and breadth to be accorded the privilege against self-incrimination. Traditionally, the reason for the privilege is one of fairness. If the ruling of the court below permitting such impeachment is upheld, then is it not possible for the prosecutor, who has a bare prima facie case and is unsure of the ability of his evidence to dispel a jury's reasonable doubt, to haul the defendant before the grand jury and force him either to testify without the presence of counsel or to refuse to testify and thus lay himself open to devastating impeachment at the trial? What is there to prevent the prosecutor from calling the defendant before the grand jury even after indictment so that the defendant has the choice either of testifying then without counsel (despite his constitutional guarantee of counsel at every stage of the proceedings) or of impeaching any credibility to be accorded his later testimony in his own defense? It is no answer to say that (whether before or after indictment) the accused can avoid either horn of the dilemma by refusing to testify before the grand jury and by staying off the witness stand at his trial. Such an answer means that the Fifth Amendment can be turned into an

offensive weapon by the prosecution to checkmate the defendant. It opens the way for the prosecution to set the stage for comment—and proper comment under the decided cases—that the prosecution's evidence stands undenied and uncontradicted, **Baker v. United States**, 8 Cir., 115 F. 2d 533. It is difficult to believe that the framers of the Fifth Amendment intended such a result.

Furthermore, petitioner's request for an instruction placing the permitted impeachment in its proper perspective, it is submitted, should have been granted; if the impeachment is proper as held in **Viereck v. United States**, App. D. C., 139 F. 2d 847, then the impeachment should have been so restricted and presented to a jury of laymen that they would not place undue emphasis on the proper invocation by a defendant of his constitutional privilege to some twenty-seven different incriminatory questions. Today, with the press full of catchwords as "Fifth Amendment Communists," "Fifth Amendment Teachers," etc., the refusal to answer under the protection of that Amendment is popularly regarded as a confession of guilt. As best he can, a trial judge, having permitted such impeachment, should give to the jury, as with the rest of his charge, the legal perspective on such refusal to answer. It no doubt will not be the only instance wherein the trial court's charge will differ from the layman's notions of justice and guilt. Such an instruction, as requested here, is amply supported by the language of Mr. Justice McKenna in **Burdick v. United States**, 236 U. S. 79, l. c. 94:

> "If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, **not necessarily in fact, not at all in theory of law.** It supposed only a possibility of a charge of crime and interposed protection against the charge and, reaching beyond it,

against furnishing what might be urged or used as evidence to support it." (Emphasis added.)

The questions presented here have never been directly ruled by this Court. In view of the dynamic character of the Fifth Amendment, the broader use of the inquisitorial process and this Court's own changed concept of the Fifth Amendment (see **Mason v. United States**, 244 U. S. 362, as compared with **United States v. Hoffman**, 341 U. S. 479), it is submitted that the rulings of the Courts of Appeal on this question should be re-examined and the law uniformly declared.

5. The terms of petitioner's probation on his conviction for obstruction of justice prevent him from holding any office in or employment by any organization of labor or any labor affiliate. This form of sentence and probation has become commonplace in the Eighth Circuit and Seventh Circuit for persons convicted of labor racketeering, see **Callanan v. United States**, 8 Cir. (now on appeal), **Dale v. United States**, 7 Cir. (now on appeal). This is the first time that it has been applied to a labor leader convicted of endeavoring to obstruct justice. It is suggested that whatever may be said of the reasonableness of the relationship between labor racketeering and continued employment by a labor union, no such relationship is present between the crime of obstructing justice and employment in the field of labor. There is nothing inherently conducive to the crime or any special temptation presented to employees of labor unions more than persons in other occupations. The terms of probation must reasonably relate to the offense charged. The restrictions imposed here are arbitrary and unfounded prohibitions which actually amount to additional punishment, having no reasonable relationship to the petitioner's rehabilitation.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari in the above consolidated causes should be granted.

Respectfully submitted,

STANLEY M. ROSENBLUM and
MARK M. HENNELLY,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.